No. 82-2154

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MONTGOMERY MALL LIMITED PARTNERSHIP,

Petitioner,

v.

GENERAL ELECTRIC CREDIT CORPORATION,

Respondent,

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Counsel of Record for Petitioner

The record shows, and it appears uncontroverted, that the General Electric Corporation (GECC) filed an action of foreclosure against Montgomery Mall Limited Partnership (MMLP) in the District Court of Bernalillo County on June 16, 1980.

GECC moved for summary judgment in the State Court on August 19, 1980, which was set for hearing on September 8, 1980. September 4, 1980, MMLP filed its Chapter 11 Petition in the Bankruptcy Court.

September 24, 1980, GECC applied to remove its foreclosure action to Bankruptcy Court.

October 1, 1980, MMLP's counsel moved to withdraw for failure to arrive at a fee arrangement and inability to get her client to review material and make decisions of course of litigation and handling debenture funds. New counsel entered an appearance October 3, 1980.

October 2, 1980, GECC filed its motion in Bankruptcy Court to grant immediate relief

from the automatic stay and for summary judgment under the removed proceedings.

The same date, the Bankruptcy Court, with counsel for both parties present, terminated the stay as to GECC, awarded judgment against MMLP under the foreclosure action, foreclosed the liens, ordered the property sold and allowed a one-month period of redemption. MMLP was allowed ten days from the entry of the order and the judgment to move to vacate the judgment.

October 14, 1980, MMLP moved to vacate the judgment stating as grounds:

Lack of jurisdiction and inadequate notice.

Inaccurate allegation.

Noncompliance with F.R.Civ.P. 56, Summary Judgments.

Offer to present a plan of arrangement.

On October 15, 1980, defendant was notified that the motion to vacate the judgment would be heard on November 3, 1980, later changed to October 30, 1980 at MMLP's request.

At this hearing MMLP still made no effort to offer any proof on the summary judgment question.

Notice of Appeal to District Court was filed by MMLP on October 31, 1980, from the Bankruptcy Court's order of October 2, 1980.

November 3, 1980, the findings, conclusions and order of the Bankruptcy Court were entered pursuant to the hearing on October 30, 1980, denying the motion to vacate the ruling of October 2, 1980.

November 3, 1980, MMLP filed its motion to stay the Court's order which was denied December 4, 1980, sua sponte.

November 12, 1980, MMLP filed its motion to stay ratification of the foreclosure sale.

November 12, 1980, MMLP filed its notice of appeal of the November 3, 1980 ruling to the District Court.

November 13, 1980, MMLP filed its amended motion to stay ratification of foreclosure sale, which was denied on December 5, 1980.

November 24, 1980, MMLP's successor counsel moved to withdraw because his client refused to follow advice and to make files available and had made no satisfactory fee arrangement. January 12, 1981, second successor counsel entered appearance.

The brief in chief of MMLP states the three questions on appeal:

1. Did Bankruptcy Court have jurisdiction to grant summary judgment.

2. Did Bankruptcy Court fail to give notice of the summary judgment hearing or deprive MMLP of the opportunity to respond.

3. Was the summary judgment clearly erroneous.

MMLP appears to agree that summary judgment is the kind of proceeding which a Bankruptcy Court now has jurisdiction to hear but that it lacked jurisdiction for failure of timely or adequate notice under F.R.Civ.P. 56, which provides for service of the motion for summary judgment at least ten days before the time fixed for the hearing.

In looking at the chronology of the foreclosure proceeding, it appears that GECC's State Court motion for summary judgment was begun on August 19th and set for hearing on September 8, a full 20 days. The bankruptcy filing on September 4, came 16 days after the motion for summary judgment. Ample time existed to controvert the issues on summary judgment in State Court. At least there was time to prepare a petition in bankruptcy. On September 24, GECC's foreclosure action was removed to Bankruptcy Court, some 36 days after the summary judgment motion was filed. October 2, GECC moved for a summary judgment of which MMLP's counsel had knowledge and made an appearance, although a motion to withdraw had been filed on October 1. This was some 50 days after the motion for summary judgment was filed and during which time no step was taken to controvert or oppose the motion for summary judgment nor to resolve the issue.

There is not an element of surprise here as MMLP was well aware of the pendency of the

motion for summary judgment and that it had been set to be heard. Before this could happen MMLP filed bankruptcy, thus staying any action on the motion for summary judgment in State Court.

The removal of the foreclosure to Bankruptcy Court was ample to put MMLP on notice that again the summary judgment motion would be a factor to contend with.

MMLP had ample time to controvert the judgment granting summary judgment and still took no step to controvert GECC's proof nor to otherwise resolve the problem.

MMLP still has not taken a step to bring the procedure to a halt by supersedeas or otherwise so as to stop the mechanism of foreclosure and sale or to protect GECC.

There was ample proof to justify the Bankruptcy Court's removal of the stay order of foreclosure and to proceed with the foreclosure sale. MMLP was in default, the property was not being adequately protected and there was a serious possibility that the pre-

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

GENERAL ELECTRIC CREDIT CORPORATION,

a New York Corporation,

Plaintiff

v.

MONTGOMERY MALL LIMITED, PARTNERSHIP,

a Texas Limited Partnership,

Defendant

Date: March 30, 1981

No. 81-066-M Civil

MEMORANDUM OPINION

mises might be closed.

The Bankruptcy Court's Order is hereby AFFIRMED.

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UNITED STATES DISTRICT JUDGE

SUPPLEMENTAL APPENDIX ?

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEW MEXICO

IN RE:

MONTGOMERY MALL LIMITED PARTNERHSIP,

a Texas Limited Partnership,

Debtor

GENERAL ELECTRIC CREDIT CORPORATION,

a New York Corporation,

Plaintiff,

v.

MONTGOMERY MALL LIMITED PARTNERHSIP,

a Texas Limited Partnership,

Defendant.

Date: November 3, 1980

Chapter 11 No. 80-00938J

Adversary Proceedings
No. 80-0419

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

Appearances: Irving Sulmeyer and Jonathan Sutin for General Electric Credit Corporation; Alfred Carvajal and Jerry Dickinson for Montgomery Mall Limited Partnership, Debtor.

The defendant's Motion to Vacate the Court's Order and Judgment of October 2, 1980 came on to be heard at 9:30 a.m. on October 30, 1980, in the Bankruptcy Courtroom in the Federal Building and U.S. Courthouse in Albuquerque, New Mexico.

Defendant argued that this Court was without jurisdiction on October 2, 1980, to grant summary judgment in favor of the plaintiffs. This argument was predicated upon two grounds. The first ground is that Rule 56(c) of the Federal Rules of Civil Procedure requires ten days notice of a hearing on summary judgment, and that such notice was not afforded to defendant in that October 2 hearing. The second ground was that this Court lacks jurisdiction under 11 U.S.C. 362(f) to go beyond the issues raised in a complaint for relief from the automatic stay.

The first argument is apparently premised upon the assumption that the hearing on October 2, 1980, was an ex parte hearing under 11 U.S.C. Section 362(f). However, such was

not the case. Although a very short notice was given of the hearing, oral notice that the hearing would be held on October 2 was conveyed to counsel for the debtor both by the Court and by counsel for GECC on October 1, 1980. Present counsel for the debtor, having erroneously assumed the hearing was ex parte, analogized a 362(f) hearing to a hearing under Section 362(d). Undoubtedly, such an analogy is appropriate.

However, counsel's conclusion that this Court lacks jurisdiction to consider the issues in the foreclosure case is totally without merit. The cases cited by counsel to support the contention are all cases involving suits commenced prior to October 1, 1979, and hence have no applicability to a case, such as this one, commenced after October 1, 1979. In the cases cited, no summary jurisdiction existed in the Bankruptcy Court as it was then constituted. Accordingly, those cases are appropriate for the proposition that the formerly limited jurisdiction in the

Bankruptcy Court was not properly invoked in some circumstances. They have no application to a complaint for relief from stay in a Code case. The pernicious distinction between summary and plenary jurisdiction has now been accorded the decent burial it so richly deserved. The Bankruptcy Court as now constituted has ample jurisdiction to decide issues in a foreclosure case. As an illustration of that point, the foreclosure action pending in this Court was removed from the District Court of Bernalillo County.

A second erroneous assumption, again entirely unsupported by fact, is made by debtor in connection with the spurious asserted jurisdictional limitation. Although normally it is inappropriate to consider matters other than a complaint for relief from the automatic stay at a hearing on such complaint, that reticence springs from the statutory mandate and consequent necessity to hear such complaints within thirty days of the day they are filed. It is simply not possible to hear such

complaints, coupled with all other matters that might be present in those cases, within that thirty-day period. This reluctance to hear is not an institutional inability to take up and decide the matters in a jurisdictional sense, but is based solely on limitations imposed by time and space. This reluctance is attempted in this case to be translated into a lack of jurisdiction.

This bankruptcy petition was filed after the institution of a foreclosure petition in the state district court. After the appointment of a receiver in that case by Judge Cole, plaintiff GECC served and filed a Motion for Summary Judgment in the state court. On the day of the hearing in the state court on that summary judgment motion, debtor filed its petition herein, thus invoking the automatic stay and divesting the state court of the power to go forward and hear the issues in that case. It is this foreclosure action which was then removed from the state court.

The debtor was properly served with a

summary judgment motion in the state court in August of 1980 when that motion was filed. Debtor had ample opportunity to file a contraverting affidavit in the state court, and, after the action was removed to this Court, had ample time in this Court, but chose not to do so.

After this Court disposed of all the issues in the automatic stay phase of the hearing on October 2, the Court proceeded to the Motion for Summary Judgment, in accordance with the oral notice given to counsel for the debtor by counsel for GECC. The second point raised in the Motion of the debtor is that there was inadequate notice given for that hearing on the summary judgment issue. That argument misconceives both the facts of this case and the application of Rule 56.

Debtor asserts that it was not given any opportunity to present opposing affidavits. It is a familiar principle that when a case is removed from a state court to a federal

court, the federal court sits as if it were the state trial court. In the removed case, debtor had almost fifty days to present opposing affidavits and chose not to do so. Debtor's argument further misconceives the ten-day notice provision under Rule 56. That rule requires that the summary judgment motion be served at least ten days before the day fixed for the hearing upon that Motion. As stated, the summary judgment motion in this case was filed in August in the removed proceedings. Rule 56 does not require that ten days notice of the hearing on the summary judgment be given, but only that the service of the motion be ten days prior to the hearing. There was full compliance with that rule in this case.

In addition, Rule 6(d) permits the time within which motions may be heard to be shortened. Although a very short notice for the hearing on summary judgment on October 2 was given, notice in fact was given. That notice was pursuant to a telephone call from counsel

for GECC, Mr. Charles Price, a young lawyer in whom the Court has great confidence. Mr. Price reported only that an emergency existed in the view of GECC, and asked for an emergency hearing. The Court was about to take up another matter in the Courtroom, and asked Mr. Price to give notice to counsel for the debtor. It was acknowledged that such notice was given. Thus, we are dealing here with a situation in which notice, concededly very short, was given, and not a case where there was a lack of notice.

Therefore, cases such as Franklin v. Oklahoma City Abstract and Title Company, 584 F.2d 964 (1978) are not in point. That case involved a 12(b)(6) Motion, which the trial court treated as a motion for summary judgment without notice to the plaintiff of its intention to do so. In the case at bar, the Motion filed was one for summary judgment, and thus there was no necessity for again informing debtor of that fact. This is particularly true since the reason for the

Franklin rule is to provide a "reasonable opportunity to present all material made pertinent" to the summary judgment motion. As stated, more than adequate opportunity has been afforded to debtor herein.

In addition, a further point of considerable importance should be made with respect to the opportunity to be heard. Some twenty-eight days passed between the entry of the Court's judgment on October 2 and the hearing on the Motion to Vacate on October 30. Yet within that twenty-eight day period, debtor made no attempt to file any motion or affidavit which contained any factual recitation sufficient to raise a genuine issue of material facts so as to defeat the motion for summary judgment. Surely if such facts were available, debtor had adequate opportunity within that time to bring them forward. Indeed, the Court's oral order from the bench on October 2 was to the effect that if the debtor came forward to do the necessary repairs it would be restored to the posses-

sion upon an adequate showing of its ability to make those repairs. No such showing was attempted to be made in this case. Accordingly, the Motion, based as it is only upon the asserted lack of jurisdiction should be, and the same hereby is, denied.

In order to insure that all the matters which debtor might wish to present on the merits were presented and considered, and that the debtor was not deprived of a full and fair opportunity to present its case, the Court invited evidence even after ruling it would not, on jurisdictional grounds, vacate its previous Judgment of October 2. Evidence on the issue of adequate protection abduced at the October 30 hearing confirmed that the debt to GECC approximates $8,000,000.00 and that the value of the collateral is between $6,000,000.00 and $7,000,000.00. Thus, the debtor has no equity in the project. Indeed, Goldner, the president of the coporate general partner of the debtor testified that in his view the

property had a value of no more than four and a half million dollars, based upon the current rental situation.

From the evidence that was presented, the Court has no alternative but to find that serious structural discrepancies and deficiencies exist at the Montgomery Mall, and that these deficiencies present an immediate hazard to public safety. Debtor has no intention of performing its duty to make these premises safe for the public and for the merchants who lease from it.

Officials of the City of Albuquerque testified that if no repairs were undertaken, they would be forced to undertake legal action under an emergency basis to shut down the Mall until repairs were undertaken. Although debtor made much of the fact that the City had not as yet instituted those proceedings, the reason for any delay was that GECC had commenced the repairs. After the Court order of Thursday, October 2, GECC retained a contractor and commenced the

repairs on Friday, October 3, and informed the City of the engineer's report and the corrective action on Monday, October 6.

Moreover, the lack of equity in the project makes clear the reasons for the debtor's cavalier attitude towards its obligation. The unfavorable publicity necessarily attendant upon the institution of the emergency legal action seeking to force the closing of the Mall for the reason that the structure was in danger of collapse, thus exposing the shoppers to hazard, would not wound the debtor, who could walk away without further loss. But such publicity would undoubtedly have a severe impact upon the merchants, who would undoubtedly feel aggrieved at such a turn of events, and ultimately reduce the market value of the Mall still further. Thus there would appear to be no adequate protection for the interest of GECC, apart from the fact that it is already in a deficit position.

Had debtor evidenced both the desire and the ability to make the immediate repairs

necessary to make the premises safe, the Court would have vacated its prior order and permitted the debtor to again operate the premises. But the debtor recognizes that its ability to propose a meaningful reorganization depends on reaching some sort of accomodation with GECC, and debtor is not sufficiently certain of its ability to make that agreement to persuade it to make the emergency repairs. Those repairs are estimated at a cost of $215,000.00 on an emergency basis, and to reach $700,000.00 in order to make the permanent repairs necessary to correct the deficiencies.

Having elected to eschew its obligations to make the premises safe, debtor chose to hope that perhaps no force would occur to destroy the structure or have it deteriorate further. Such a hope is not an adequate basis for refusal to make the repairs or to protect the public.

Other instances of what can best be described as debtor's indifference to its

obligations is the debtor's attitude toward the cash collateral. Debtor's position, announced quite forthrightly, was simply that it would ignore the statutory prohibition contained in 11 U.S.C. 363(c)(2) against the use of such collateral by a debtor, absent consent by an affected creditor or approval by the Court.

It is this Court's view that it is imperative that the repairs be made to the structure immediately or that the premises be closed to the public until such time as the repairs are made. If the premises are closed to the public, it is the Court's feeling that there would be no hope of a successful reorganization. Accordingly, the only practical course is to make the repairs and keep the Mall open.

The debtor has announced that it will not make the necessary repairs unless it can make an agreement with General Electric Credit Corporation, which agreement has not been forthcoming. Accordingly, it seems to the

Court that the Summary Judgment in favor of GECC should be confirmed.

The Court has treated the Motion to vacate the sale, currently scheduled for November 5, as an adjunct to the Motion to Vacate the Order of October 2. Since it is the Court's view that the Order of October 2 should not be vacated, the Court is likewise of the view that the sale previously noticed for November 5, 1980, should not be postponed.

DONE at Albuquerque, New Mexico on this 3rd day of November, 1980.

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UNITED STATES BANKRUPTCY JUDGE